No. 14698

CIVIL

In the United States Court of Appeals

For the Ninth Circuit

G. V. FEELEY, AS ADMINISTRATOR OF THE ESTATE OF GEORGE A. FEELEY, DECEASED,
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,
Appellee.

Appeal from the United States District Court for the District of Montana

Appellee's Brief

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STATEMENT OF THE CASE

This appeal presents two basic questions:

(1) Was the defendant appellee entitled to a directed verdict? If so, the judgment must be affirmed.

(2) Was there any reversible error in the charge? If not, the judgment must be affirmed.

We submit first that a directed verdict should have been granted. The accident occurred in the day time at an open, country grade crossing. The weather was clear; the road dry. The crossing was heavily used by rail traffic at all hours of the day and night. Deceased had been thoroughly familiar with the crossing for over thirty years, and knew of its heavy use. For over 100 feet of approach to the crossing, deceased had an unobstructed view of the crossing itself and of the tracks to the west for over a quarter of a mile. Deceased approached in a jeep at a speed of 10 to 15 miles per hour at which his stopping distance was not less than 14-¾ ft. and not more than 33-½ ft., or in time between 1 and 1.51 seconds from the crossing. The train at that moment was 66.37 ft. to 110.5 ft. from the crossing approaching at 45 miles per hour; it would take at least 80 feet after the brakes were applied before braking action commenced; and the train could not stop in less than 500 ft. to 680 ft. Both vehicles approached simultaneously without stopping to the crossing and the impact.

We respectfully submit that under such facts, the deceased's own negligence proximately caused the accident, and last clear chance is inapplicable. Defendant appellee was entitled to a directed verdict on the grounds set forth at pages 298 (Supplemental Transcript), 325 and 326 of the transcript. The judgment should be affirmed.

In any event, we respectfully submit that there was no reversible error in the charge to the jury.

STATEMENT OF FACTS

There is no statement of facts in the brief of appellant. Accordingly, we shall review the evidence somewhat in detail.

1. SCENE OF ACCIDENT AND UNOBSTRUCTED VIEW.

In our statement of the case we have said that the accident occurred in the daytime at an open, country, grade crossing. An excellent picture of the crossing, of the dirt road approaching the crossing, upon which the deceased was traveling, and the view of the deceased to the right or west can be gathered from three photographs introduced in evidence consisting of Defendant's Exhibit 8, taken from a point 100 feet north of the crossing *(T. 312-313),* Defendant's Exhibit 9 taken from a point located 75 feet north of the crossing *(T. 313-314),* and Defendant's Exhibit 10 taken from a point south of the crossing, looking toward the north, and giving an accurate view of the approach road from approximately the right of way fence 75 feet north of the crossing *(T. 314-315, 317).*

An aerial photograph was likewise introduced in evidence as Plaintiff's Exhibit 3 *(T. 132).*

Finally there was introduced in evidence Plaintiff's Exhibit 1, consisting of a map of the immediate area *(T. 32).* Plaintiff testified that the objects, points and distances shown on that map, Plaintiff's Exhibit 1, were correct *(T. 48-49).* Plaintiff then put in considerable in-

formation in the map, Plaintiff's exhibit 1, and indicated that there was no foliage from the point on the map marked as No. 4 on south to the track, *(T. 126-127)*, and from that No. 4 on south to the crossing, and from there west, the map was accurate *(T. 139)*.

From the photographs, and the map, supplemented by the testimony of the witnesses, it appears that there were two sets of double tracks, 50 feet apart *(T. 32, 1. 23-25)*, that the main line track ran substantially due east and west *(T. 36, 1. 8)*, and that U. S. Highway No. 10 located south of the tracks was substantially parallel with the main line of the railroad *(T. 36, 1. 11-16)*. The tracks were substantially level *(T. 62-63, T. 156)*.

No. 8 was placed on Plaintiff's Exhibit 1 at the point where a barbed wire fence ran east and west paralleling the track to the north, and from No. 8 to the north track was a distance of 75 feet *(T. 45)*. Four trees extending from north to south and bordering the west side of the road approaching the track from the north were numbered 1, 2, 3, and 4, respectively, with No. 4 representing the southernmost tree *(T.44)*. From No. 1 tree to the track was 257 feet, No. 3 to the track 200 feet, No. 4 to the track 176 feet *(T. 45)*. The point marked AA on Plaintiff's Exhibit 1 represents the centerline of the approach road to the crossing, at the point where a road branches off into the plaintiff's home, and from that point AA to the crossing was 297 feet *(T. 35)*.

The dirt road approach had no loose gravel on the surface, was packed solid, and was hard and dry. The level

of the tracks was from 3 feet to 4 feet higher than the road. The upgrade on the dirt road was gradual from a distance commencing at a point approximately 30 feet to the north of the right of way fence, and then was gradual throughout the balance of the distance up to the track *(T. 66-67, 141-142).*

Over objection, plaintiff was permitted to testify as to an experiment which he made at eye level from points on the railroad tracks to the west of the crossing of automobiles at two points on the approach road *(T. 231-238).* Even at eye level, when the plaintiff was at a point on the track 600 feet west of the crossing, an automobile was then fully visible in the approach road at the point marked AA *(T. 236),* and the court will recall that that point was 297 feet from the crossing. When plaintiff was on the tracks 819 feet west of the crossing at the point on Plaintiff's Exhibit 1 marked 00, he could then see an automobile where it had just turned south on the lane at the point marked NN on Plaintiff's Exhibit 1 *(T. 237-238)* and that point NN was in excess of 200 feet from the crossing.

It is undisputed from the testimony of the witnesses, the photographs, and the map, that from the time the deceased was at a point in excess of 100 feet north of the crossing, he at all times had an unobstructed view to the west along the tracks for over one-quarter of a mile.

2. THE CROSSING WAS HEAVILY USED BY RAIL TRAFFIC, AND DECEASED WAS THOROUGHLY FAMILIAR WITH THE CROSSING AND ITS USE.

Plaintiff testified that trains ran over that crossing at all hours of the day and night, that his father knew that as well as he did, his father had lived north of the tracks since 1906, had used the road and crossing frequently before the accident, as much as several times a day, and had in fact driven a mail route and operated a school bus over the same road for some years prior to the accident *(T. 139-140).*

His father was in exceptionally good health, and wore glasses only for reading, and his hearing was perfectly good *(T. 69-70).*

3. PHYSICAL CONDITION OF THE JEEP.

Plaintiff described the physical condition of the jeep as a car in first class mechanical shape; it had been overhauled recently and had new tires on it. The engine had been overhauled and the brakes were good. As far as he knew, everything was in first class operating condition on the vehicle. *(T. 68-69).* The jeep had four wheel brakes, and he had driven the jeep at noon that day, shortly before the accident, and found the brakes in good working order. *(T. 140).*

4. SPEED AND STOPPING ABILITY OF THE JEEP.

Two members of the train crew saw the jeep, and estimated its speed at 10 miles an hour *(Clarkin, T. 190, l. 23; T. 191, l. 13-15; T. 192, l. 3-6; Becker, T. 207; T. 219, l. 25; T. 220, l. 1; Plaintiff's Exhibit 7, l. 32 on Pp. 1 through l. 3 on Pp. 2).*

Allegations in the replies in both causes of action ad-

mitted in evidence alleged that the jeep was traveling at the rate of 12 to 15 miles per hour when it was within 50 feet of the crossing *(T. 318-319)*.

Two highway patrolmen estimated the braking distance, and over-all stopping distance at the various speeds. Lehman testified that at 10 miles per hour braking distance would be 4-¾ feet to 8-½ feet *(T. 149)*, with a reaction time of 10 feet *(T. 150)*. His estimate of the over-all stopping distance at 10 miles per hour would be 14-¾ feet to 18-½ feet.

Sergeant Burnham estimated the braking distance at 10 miles per hour between 4-¾ feet and 6 feet, with an over-all stopping distance at that speed of 14-¾ feet to 16 feet *(T. 320-323)*.

At 15 miles per hour, Lehman estimated the braking distance at 10-¾ feet to 18-½ feet with a distance traveled during reaction time of 15 feet, or a total over-all stopping distance at 15 miles per hour of 25-¾ feet to 33-½ feet *(T. 324)*. Burnham estimated the braking distance at 15 miles per hour at between 8-¾ feet to 15 feet, or an over-all stopping distance of 23-¾ to 30 feet *(T. 320-323)*.

Burnham testified that the stopping distance of a jeep at 12 miles per hour would be very close to half way between the stopping distance for 10 and 15 miles per hour respectively *(T. 323)*.

5. SPEED AND STOPPING ABILITY OF THE TRAIN.

Terlson estimated the speed of the train at the moment

of impact at 45 to 50 miles per hour *(T. 162);* Clarkin 45 to 50 miles per hour *(T. 191, 192);* and Becker at 45 miles per hour *(T. 220).* Campbell, witness for plaintiff, testified concerning a conversation with Clarkin at the scene of the accident shortly after it occurred, at which time he said Clarkin told him that the speed of the train was 45 miles per hour *(T. 247).* Proof by the appellant concerning the stopping ability of the train was based on its speed of 45 miles per hour *(Hoovestal, T. 83; Morton, T. 251).*

Hoovestal was questioned by the appellant as an expert on stopping distances, subject to the objection of the defense that no sufficient foundation was laid and the defense was granted a running objection *(T. 84, 86, 87 and 90).* On cross-examination he volunteered that he was not an expert on stopping distance *(T. 100).* Likewise, he testified that he could not say from the testimony he had heard whether or not the train had been dynamited *(T. 95),* that he could not attempt to answer, and did not really know, the distance the train would travel before brakes were applied *(T. 91, 1.3),* that he had only operated himself an engine on one occasion *(T. 99),* that he had never applied the emergency brakes on a train *(T. 86, 1. 10),* but that he had worked as a fireman between 1942 and 1945, although he had not worked since *(T. 99).* He further testified that he was never on a train of that length and size when an emergency stop was made *(T. 100, 1. 14-16),* that he had never applied an emergency brake on any train *(T. 86, 1. 10).* Assuming that his testi-

mony was admissible, despite his admission that he was not an expert, and despite the qualification he himself made concerning his ability to testify, he did say that the train would come to a normal stop in 900 feet *(T. 88, l. 10)*, and could make an emergency stop in approximately 500 feet *(T. 89)*.

Morton, a retired engineer, was also called by the appellant as an expert on stopping distance. We have considerable doubt whether or not he was sufficiently qualified to testify as an expert, but assuming that he was, he said that two car lengths would be 80 feet in length *(T. 252, l. 22)*, and that the train would travel about two car lengths after the brakes were applied before any braking action would commence *(T. 251-252, l. 23-25 and l. 1)*. He testified that at 45 miles per hour, the train would travel 80 feet from the time the brake lever was applied, before braking action commenced, and an additional 600 feet thereafter before the train would stop at 45 miles an hour, or an over-all total of 680 feet from the time the brake lever was applied *(T. 253)*. On cross-examination he admitted that his opinion was based entirely on an air brake table in a brake book *(T. 253)*, that he agreed with the statement of the table in that book that the table was based on the "impossible assumption of the same holding power or shoe friction at different speeds" *(T. 253-257)*.

6. TIME OF DAY OF ACCIDENT.

Plaintiff was out in a field approximately 300 yards to the east and north of the crossing. The train went by

him after the accident had occurred, stopped, backed up and stopped at the crossing. It was after the train had backed up and stopped at the crossing when plaintiff then for the first time looked back towards the crossing *(T. 143-144)*. The atmosphere was clear, it was a clear day, with no clouds to speak of, extremely dry. When he arrived at the scene, he was inclined to say it was broad daylight. There was no obstruction as far as his vision was concerned as far as light was concerned *(T. 63, 1. 18-25)*. He was asked at what time of day the accident occurred, and said it was getting along toward sunset in the vicinity of 5:00 *(T. 53, 1. 1-3)*. With respect to whether or not the sun had already set the moment when he first looked toward the crossing, he answered, "I am not prepared to say whether the sun had set or whether it had not. My impression is that it just dropped below the horizon." He did not know where the sun actually was at the moment of impact of his own knowledge. He admitted that at the time the accident occurred, he got the impression from the conversation there at the scene that it had occurred at 5:10 P. M. *(T. 144-145)*. Plaintiff's wife testified that she heard the crash, that it occurred after 5:00 P. M., but she could not exactly say what time of day it was, except that it was daylight *(T. 266)*. The fireman testified that it was not dark, it was just getting dark, and was still pretty light *(T. 208)*. The engineer testified that the sun had set before the accident occurred, and he had turned the engine headlight on dim about three miles west of the point of accident *(T. 173-175)*.

Plaintiff's Exhibit 4 is a certificate of the Weather Bureau showing the time the sun set *(T. 146)*. There is no evidence whatsoever as to where the setting sun would be located at that time of the year in that geographical location, no evidence to indicate that it would in any way interfere with the deceased or his view, if it was setting when he approached.

Defendant's Exhibit 5, and Plaintiff's Exhibit 7, affidavits of the conductor and fireman, indicate that it was daylight.

7. SOUND OF THE PASSING TRAIN

Plaintiff was in the field some 300 yards to the east and some distance north of the crossing. He heard the sound of the crash, and then testified that he both heard and saw the engine and cars as they passed by the point where he was located *(T. 53)*. Mrs. Feeley testified that the deceased had just left her home. She heard the crash, and suspected that he might have been in the accident because just prior to that moment when she heard the crash, she had heard the rumbling of the train and knew that it was approaching, and she heard that from her location within the house *(T. 269-270)*, and the house according to Plaintiff's Exhibit 1 was located approximately 290 or 300 feet north of the crossing.

8. LOOKOUT BY THE TRAIN CREW.

Conductor Clarkin was on the left or north side of the cupola of the caboose. In his affidavit, Defendant's Exhibit 5, introduced at T. 186, 201, he stated that when the engine was about 200 feet from the crossing, he saw the

jeep about 50 feet from the crossing, approaching at a slow speed, the train then going 45 to 50 miles per hour. Because of its slow speed, he thought the jeep was going to pull up close and stop.

On direct examination, Clarkin testified that the train was going 45 to 50 miles per hour, the jeep at 10 miles per hour, and that when the engine was about 200 feet from the crossing, he saw the jeep about 200 feet from the crossing. When asked whether or not that seemed reasonable to him that they would both be the same distance, he suggested the automobile must have been further off than that *(T. 190-194)*. He then stated that he was confused between the vehicles, and that when he first saw the jeep it was around 50 feet from the crossing *(T. 198)*. He had thought that the automobile traveling at the slow speed was going to drive up close to the crossing and stop *(T. 196)*. On cross-examination, Clarkin testified that regardless of estimates with respect to distances and feet, he could place the jeep by physical objects where it was when he first saw it, and that when he first saw it it was to the right or south of the barbed wire fence, or right of way fence, marked No. 8 and located 75 feet north of the track *(T. 199-200)*.

Clarkin's affidavit, Defendant's Exhibit 5, is consistent with his testimony with respect to observations and speed.

Becker testified in substance that when the engine was approximately one-quarter mile from the crossing, he saw the jeep as it came behind the cottonwood trees to turn down and go south on the dirt road. He judged its

speed at 10 miles per hour *(T. 207-210)*. As the engine passed over the switch about a quarter of a mile from the crossing, he thought it was rough, and jerked, so he watched back along his train, and along the track, and completely forgot about the jeep again until the impact. *(T. 212-213, 219-220)*. His testimony in that regard was consistent with his affidavit, Plaintiff's Exhibit 7, and the affidavit was copied from an original statement of facts which he made within a few days after the accident occurred, and which was present and compared with the affidavit at the time it was signed *(T. 281-287)*.

9. SIGNALS BY THE RAILROAD CREW.

The whistle was blown as the engine passed around the curve and approached toward the crossing, but the crew could not say at exactly what point the whistle was stopped between the curve and the crossing *(T 162-166; T. 226)*. No bell was rung *(T. 213, 226)*. Neither the plaintiff nor his wife heard a whistle or bell *(T. 267)*.

ARGUMENT

FACTS SHOWING NEGLIGENCE OF DECEASED AND INAPPLICABILITY OF LAST CLEAR CHANCE.

These facts are undisputed:

1. It was daylight, the weather was clear, the road was dry.

2. Deceased had lived beside, and was thoroughly familiar with, the crossing for over thirty years, and knew of its heavy use by rail traffic at all hours of the day and night.

3. For over 100 feet of approach, the deceased had an unobstructed view of the crossing and the tracks to the west for over a quarter of a mile.

4. The jeep was in excellent physical condition with good brakes.

5. Deceased approached in the jeep at a speed of 10 to 15 miles per hour at which speeds he could stop in a distance from the crossing of 14-¾ ft. to 33-½ ft., or at a point from the crossing measured in time from 1 to 1.51 seconds.

6. When the jeep was at its stopping distance from the track of between 14-¾ ft. to 33-½ ft., the train was from 66.37 ft. to 110.5 ft. from the crossing, approaching at a speed of 45 miles per hour; it would travel at least 80 feet of that distance of 66.37 ft. to 110.5 ft. after the brakes were applied before the braking action commenced; and it would stop in 500 feet to 680 feet.

7. Deceased drove without stopping to the point of impact.

It will perhaps assist the court to consider the following table comparing the relative distances from the crossing of the jeep and train in feet and seconds.

COMPARISON OF DISTANCES IN FEET AND SECONDS TRAVELED BY JEEP AND TRAIN

1. Jeep at 10 m.p.h.; Train at 45 m.p.h.

Jeep From Crossing		*Seconds From Crossing*	*Train From Crossing*
10 ft.		.68 seconds	45 ft.
14.75 ft.)	*Stopping* (	1.00 seconds	66.37 ft.
18.5 ft.)	*Distance* (	1.26 seconds	83.25 ft.
25 ft.		1.7 seconds	112.50 ft.

50	ft.	3.4	seconds	225	ft.
75	ft.	5.1	seconds	337.50	ft.
100	ft.	6.8	seconds	450	ft.
111	ft.	8.5	seconds) *Stopping*	(500	ft.
151. 1	ft.	10.3	seconds) *Distance*	(680	ft.

2. Jeep at 12 m.p.h.; Train at 45 m.p.h.

Jeep From Crossing		*Seconds From Crossing*		*Train From Crossing*	
10	ft.	.56	seconds	45	ft.
21.75	ft.) *Stopping* (	1.23	seconds	81.56	ft.
25	ft.) (	1.4	seconds	93.75	ft.
26	ft.) *Distance* (	1.47	seconds	97.5	ft.
50	ft.	2.8	seconds	187.5	ft.
75	ft.	4.2	seconds	281.25	ft.
100	ft.	5.6	seconds	375	ft.
125	ft.	7.0	seconds	468.75	ft.
149.60	ft.	8. 5	seconds) *Stopping*	(500	ft.
181.33	ft.	10.3	seconds) *Distance*	(680	ft.

3. Jeep at 15 m.p.h.; Train at 45 m.p.h.

Jeep From Crossing		*Seconds From Crossing*		*Train From Crossing*	
10	ft.	.45	seconds	30	ft.
23.75	ft.) *Stopping* (	1.07	seconds	71.25	ft.
25	ft.) (	1.13	seconds	75	ft.
33.5	ft.) *Distance* (	1.51	seconds	110.5	ft.
50	ft.	2.26	seconds	150	ft.
75	ft.	3.39	seconds	225	ft.
100	ft.	4.52	seconds	300	ft.
125	ft.	5.65	seconds	375	ft.
150	ft.	6.78	seconds	450	ft.
166	ft.	8.5	seconds) *stopping*	(500	ft.
226.66	ft.	10.3	seconds) *Distance*	(680	ft.

a. *Under Montana Law Applicable, Negligence of Deceased Was The Proximate Cause as a Matter of Law.*

In cases far less favorable to the defendant from the standpoint of visibility, the following rules of law applicable have been established, repeated, and reaffirmed by our Supreme Court time after time. For over 100 feet of approach Feeley's view was unobstructed. Under similar fact situations our Montana court has held that the act of proceeding from the zone of safety directly in front of the approaching train is negligence constituting *the proximate cause of his injury.*

The following are rules established in Montana in the following cases, all of which affirmed nonsuits or directed verdicts:

1. The presence of a railroad track is of itself a warning of danger.

2. A person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train.

3. If his view of the track is obscured, he must take such precautions as will render sight and hearing effective before moving into a position from which he cannot extricate himself in the event of the near approach of the train; he is required to exercise a greater degree of care for his own safety.

4. The failure of the persons in charge of the train to give warning signals of its approach does not relieve the traveler of the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed.

5. Whenever it appears that there is a zone of safety

within which a traveler upon a highway may, by looking or listening and stopping to do so if need be, ascertain the presence of an oncoming train, it is his duty to make his observation within such zone. If he proceeds from the place of safety regardless of an approaching train of which he has knowledge, or if he leaves the place of safety without having made a vigilant use of his senses to discover a danger which is present and could have been seen from such place, *then it will be held to be his negligence which is the proximate cause of an injury resulting from a collision regardless of circumstances tending to show negligence on the part of the railroad operators.*

6. When a train is at a point which is within the traveler's vision while he is in a place of safety, he will be deemed either to have seen it and proceeded regardless of the danger, or to have failed to make a vigilant use of his senses. *In such a situation the traveler is the author of the misfortune which befalls him, if he meets with injury.*

See: *G. N. Ry. Co. v. Taulbee,*
92 F. (2d) 20, cert. den. 82 L. Ed. 595, 58 S. Ct. 476.

Roberts v. C. M. & St. Paul Ry. Co.,
67 Mont. 479, 216 Pac. 332.

Rau v. N. P. Ry Co.,
87 Mont. 521, 289 Pac. 580.

Grant v. Chic. etc. Ry. Co.,
78 Mont. 97, 252 Pac. 382.

Lee v. Davis,
76 Mont. 466, 247 Pac. 1094.

West v. Davis,
71 Mont. 31, 227 Pac. 41.

Normandin v. Payne,
65 Mont. 543, 212 Pac. 285.

Keith v. G. N. Ry. Co.,
60 Mont. 505, 199 Pac. 718.

George v. N. P. Ry. Co.,
59 Mont. 162, 196 Pac. 869.

Sherris v. N. P. Ry. Co.,
55 Mont. 189, 175 Pac. 269.

Sullivan v. N. P. Ry. Co.,
109 Mont. 93, 64 P. (2d) 651.

The facts in many of the foregoing cases were less favorable to the defendant Railway Company from a standpoint of visibility than are the facts in this case. For example, in the case decided by this Ninth Circuit Court, *Great Northern Railway Company v. Taulbee, 92 F. (2d) 20, Cert. den. 58 S. Ct. 476,* at 30 feet from the track, the view was unobstructed for a distance of only 160.9 feet; from 25 feet a distance of only 184.5 feet; from 20 feet a distance of 236.2 feet; and from 15 feet a distance of 444.1 feet. In our case, throughout the last 100 feet of approach, there was an unobstructed view for a quarter of a mile. Likewise, it is interesting to note in the *Great Northern Railway Company v. Taulbee* case that there was a factual dispute with reference to whistle and bell signals. The court in that case said:

> "There Taulbee discharged his passengers. He then turned his automobile round and drove west, back to the highway, re-entering it at a point about 20 feet north of the main line crossing. From that point he drove south on the highway, without stop-

ping, until he reached the crossing. There his automobile was struck by the locomotive of an eastbound train on appellant's main line track, and he was instantly killed.

"This happened in clear daylight at about 7:05 o'clock a.m. From the time it re-entered the highway until it was struck by the locomotive, Taulbee's automobile was traveling at a speed of between 6 and 7 miles an hour, which is to say, between 8.8 and 10.27 feet a second. The locomotive was traveling at a speed of between 55 and 60 miles an hour, which is to say, between 80.67 and 88 feet a second.

"Demonstrably, therefore, when Taulbee's automobile was 20 feet from the crossing, the locomotive was within 200 feet thereof and was in plain view of Taulbee. If he did not see it, it was because he did not look. His view of it was wholly unobstructed. If he had looked, he could have stopped his automobile in time to avoid the collision. Failing to do so he was guilty of negligence. (Citing cases.)

"Whether or not appellant also was negligent, or whether its negligence, if any, concurred with Taulbee's in causing the collision, it is unnecessary to decide. Taulbee's negligence, if not the sole cause, was at least a proximate cause of the collision. Whether it was the sole cause, or was a concurrent cause amounting to contributory negligence only, is immaterial. In either case, recovery is barred.

"Appellant's motion for a directed verdict should have been granted."

In *Grant v. Chicago, Milwaukee & St. Paul, 78 Mont. 97, 252 Pac. 382,* the train approached in a cut of varying depth. At 50 feet from the track, the upper part of the engine only could be seen at a distance of 198 feet from the crossing; at 40 feet the engine from the center of the boiler up could be seen at a distance of 235 feet from

the crossing; at 30 feet the engine from the boiler up at a distance of 293 feet; at 20 to 25 feet, the entire engine at a distance of over 335 feet. In that case, our Montana Supreme Court said:

> " * * * and if a view of the track is obscured or factors make the sound of an approaching train inaudible, he must take such precautions as will render sight or hearing effective before moving into a position from which he cannot extricate himself in the event of the near approach of the train."

In *Rau v. N. P., 87 Mont. at 537, 289 Pac. 580,* the Supreme Court said:

> " 'Every person is bound to an absolute duty to exercise his intelligence to discover and avoid dangers that may threaten him. When, therefore, a plaintiff asserts the right of recovery on the ground of culpable negligence of the defendant, he is bound to show that he exercised his intelligence to discover and avoid the danger which he alleges was brought about by the negligence of the defendant.' (Citing cases.)
>
> " 'A person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train. The failure of the persons in charge of the train to keep a lookout and to give warning signals of its approach to the crossing does not relieve the traveler from the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed. (Citing cases.) It is not always sufficient if he does look and listen. The obligation resting upon him is to exercise care to make the act of looking and listening reasonably effective. (Citing cases.) If he goes upon the crossing without taking this precaution, he is guilty of contributory negligence. (Citing cases.)'
>
> " 'The rule as to the caution with which one must

approach a railroad crossing in this state without being guilty of negligence has been thoroughly established, and requires a person to use his senses vigilantly to determine whether or not a train is approaching, before he goes upon the track. This requires that he use his eyes and ears, and, if necessary to make his looking and listening reasonably effective, he must stop at such point as will accomplish that purpose.' "

After discussing the foregoing rules and cases, the court reversed a judgment for plaintiff and directed a judgment for defendant in *West v. Davis, 71 Mont. 31 at 43, 227 Pac. 41,* with this language:

"Applying these principles to the case at bar, the conclusion cannot be avoided that the plaintiff in this action was himself guilty of such contributory negligence *as constituted the proximate cause of the collision between his automobile and the train.* It is apparent * * * the train, at the time when plaintiff was in a place of perfect safety, was at a point where plaintiff could not have failed to observe and hear it if he had looked or listened * * * ; and we think, for the reasons above stated, and in view of the previous decisions of this court, that the trial court erred in refusing to grant the nonsuit requested by the defendant at the close af plaintiff's case, and also erred in refusing to direct a verdict for defendant, * * * . "

In affirming a judgment of nonsuit, the court said in *Roberts v. Chic. etc. Ry., 67 Mont. at 480, 216 Pac. 332:*

"At that point she was in a place of safety, and it was her duty to remain there until the danger passed. Having proceeded beyond to a position which was at least debatably dangerous, with the approaching train in view, *it must be held that her negligence was the proximate cause of her own death, and that notwithstanding the speed of the train, and notwithstanding the failure to give proper*

warning signals, at the proper place, the railroad company was not liable for the result of the collision."

The other Montana cases cited above in addition to those from which we quoted, set out the same basic rules.

In addition to the case decisions cited and quoted above, deceased was negligent as a matter of law when he violated the following section of our Code:

> " * * * provided, however, all persons driving motor vehicles * * * where the view is obscure, or when a moving train is within sight or hearing, shall bring said vehicle to a full stop not less than ten nor more than one hundred feet from where said highway intersects railroad tracks * * * " *(Section 72-164, R.C.M. 1947).*

Accordingly, under the foregoing unbroken line of Montana decisions, deceased, who knew of and was familiar with the heavily used crossing, was required to take such precautions as were necessary to assure himself that there was no danger from an approaching train before moving into a position from which he could not extricate himself. When he approached the crossing without stopping, and drove from a place of safety without having made a vigilant use of his senses to discover his danger, it must be held that it was his own negligence which was the proximate cause of his accident. This would be even more true if his view was obscured by the sun, of which there is no evidence.

b. *Last Clear Chance Inapplicable.*

Plaintiff appellant cannot avoid the effect of the unbroken line of Montana decisions above holding that the

acts of the deceased Feeley were the proximate cause of his accident. Labeling his actions as last clear chance cannot convert negligence which is a proximate cause, to negligence which is a remote cause. There is simply no room for the application of the doctrine under a set of facts where both parties approach simultaneously to the point of impact, where the automobile driver has the obligation to vigilantly look for the train, stopping to do so if necessary, and where the automobile actually has the greater stopping ability, and thus the last clear chance to avoid the accident.

To find for the plaintiff appellant in this case, the court would have to hold that every train approaching a grade crossing has to be kept under the same control as an automobile. The court would have to revoke the well established basic rule that an engineer approaching a crossing such as the one in this case has the right to assume and act upon the assumption that any person approaching such crossing is in possession of his faculties of sight and hearing, and that he will use these faculties and will look and listen and see and hear the train if it can be seen or heard, and will stop before reaching the track. If a train had to slow down or stop at its stopping distance from every crossing to which a motor vehicle was simultaneously approaching, time schedules and the orderly flow of transcontinental rail traffic would be eliminated. We do not think the law requires such control as the plaintiff appellant advocates.

In the *Armstrong* case, *110 Mont. 133, 99 p. (2d) 323,*

our Montana court indicated we will in the future follow the enlightened view of the Restatement of Torts. *Section 479* involved in that case was based on a fact situation where the plaintiff was in helpless peril and unable to avoid the accident by the exercise of reasonable care. Our case is one where the deceased at all times right up to the moment of impact could have avoided the harm and falls squarely with the next section of the Restatement, *Section 480*. That reads:

> "Sec. 480. Last Clear Chance; Negligently Inattentive Plaintiff.
>
> "A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover, if, but only if, the defendant
>
> (a) knew of the plaintiff's situation, and
> (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
> (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

In *Collins v. Crimp, 91 Mont. 326, 8 p. (2d) 796,* a boy on a scooter struck a car and landed on the fender. The car at 15 miles per hour could have stopped in 4 or 5 feet but continued 45 feet during which time the boy fell off and was run over. The court reversed a plaintiff's verdict and held there was no liability under last clear chance as a matter law for any failure to slacken speed or stop because of the fact the defendant had only 3 sec-

onds in which to act between the instant of impact and the moment when the boy fell from the fender.

> "The evidence does not warrant a finding that, driving the almost infinitesmal period of time between the moment the boy landed on the fender and the instant he slid to the pavement, the defendant was negligent in failing sooner to apply his brakes, which negligence was the proximate cause of the boy's death."

There are no other Montana cases to afford plaintiff any solace. To permit this case to go to a jury would constitute a complete, radical departure in Montana law.

The latest application of the doctrine in Montana in a crossing case is in *Pollard v. Oregon Short Line R. R. Co., 92 Mont. 119, 11 p. (2d) 271.* The railroad engineer in that case testified to facts similar to those in this case—that is, that the motorist was at all times approaching the crossing as the train was approaching in his plain, unobstructed view. In direct contradiction of the testimony of the engineer, the plaintiff motorist in the *Pollard* case testified that his car stalled on the crossing before the train ever came into view one-half mile away. As far as his evidence was concerned he was never in a zone of safety; he was at all times in a position of danger on the tracks. The opinion reads in part:

> "It is to be noted that the engineer did not say that he saw the truck but did not know that it was occupied * * * . His explanation is that he saw the plaintiff driving his truck and approaching the crossing simultaneously with the approach of the train, and saw that plaintiff was not going to stop too late to stop the train. His story is supported by the testimony of the fireman * * * . However, this testi-

mony but created a conflict in the evidence; the jurors were at liberty to believe the engineer when he said he was keeping a vigilant lookout and did see the plaintiff in his truck, and to disregard his testimony as to where the truck was, in favor of the plaintiff's statement that the truck was stalled upon the track before the train rounded the curve half a mile away; * * * "

Because of the motorist's testimony that he was stalled on the crossing, the court affirmed the submission to the jury. The opinion reads further:

"It is true that this court has recognized the rule that where an accident is the result of negligence of the plaintiff concurring with the primary negligence of the defendant up to and producing the injury, there is no room for the application of the last clear chance doctrine (citing cases), but the doctrine presupposes negligence on the part of the plaintiff and attaches in spite of such negligence when there is a break in the sequence of events. Here as in the Neary case, the plaintiff remained passive and oblivious of his danger, because of his preoccupation in the work at hand, and thereafter * * * the engineer discovered his perilous situation in time to have avoided the accident, but did not employ the means at his command to avoid it, and 'the defendant's last act of negligence becomes the sole proximate cause of the injury, while his initial negligence and the primary negligence of the defendant become but the remote cause thereof.' (citing cases) * * *

"The evidence is sufficient, if believed by the jury, to warrant the implied finding that the plaintiff was so absorbed in his efforts to get the truck off the track for the protection both of the truck and the rolling stock and passengers of the defendant as to bring the case within the rule announced in the Neary Case, and thus render the doctrine of the last clear chance applicable."

Railroad crossing case decisions prior to the Pollard case involved a similar situation where the plaintiff was at all times in a zone of danger in front of the oncoming train and was never in a zone of safety; where the defendant saw him in the zone of danger and had plenty of time thereafter in which to stop. In *Neary v. N. P. Ry. C., 37 Mont. 461, 97 Pac. 944,* an employee was standing on the track engrossed in his work. In *Riley v. N. P. Ry. Co., 36 Mont. 545, 93 Pac. 948;* in *Melzner v. N. P., 46 Mont. 163, 127 Pac. 146,* and the companion case of *Haddox v. N. P., 46 Mont. 185, 127 Pac. 152;* in *Dahmer v. N. P. Ry. Co., 48 Mont. 152, 136 Pac. 1059;* in *Doichinoff v. Chic. etc. Ry. Co., 51 Mont. 582, 154 Pac. 924;* and in *Stricklin v. Chicago etc. Ry. Co., 59 Mont. 367, 197* Pac. 839, the plaintiffs were on the tracks at all times in a zone of danger.

In deciding the *Pollard* case the Montana Supreme Court cited and relied upon decisions from other jurisdictions, including Washington, Utah, California, Iowa, North Carolina and Virginia. It is interesting to note that all those decisions cited and relied upon were similar as far as facts were concerned—that is, plaintiffs not approaching danger but rather at all times in a zone of danger. If we examine later decisions from those same jurisdictions involving a fact situation similar to this case, where both vehicles were approaching at the same time, we find the court's ruling with the defendant was a matter of law.

Washington was one of the jurisdictions cited and re-

lied upon by the Montana court in the *Pollard* case. In a later case, *Northern Pacific Ry. Co. v. Robison, Ninth Circuit Court, Washington, 143 F. (2d) 352,* this court reversed a judgment for plaintiff and held, just as it did in *Great Northern Railway Company v. Taulbee,* above, that a directed verdict should have been granted. The decision indicates there was a failure to ring the bell or blow the whistle in violation of statute, and that deceased was not familiar with the crossing as was the deceased Feeley. This court held:

> "The evidence establishes without conflict the following facts: The collision occurred in midafternoon (4:15 P.M.) of a clear, bright, sunshiny midsummer day. The crossing where the collision occurred was a right-angle crossing, the railroad running east and west, the highway north and south. The train was traveling east at a speed of about 35 miles an hour. The automobile was traveling north at a speed of about 45 miles an hour. On the east side of the highway, 15½ feet south of the crossing, there was a standard railroad crossing sign consisting of a pair of crossarms six feet long mounted on a post ten feet high, with the word 'Railroad' painted on one arm and the word 'Crossing' painted on the other. Decedent, driving north on the highway, had an unobstructed view of the crossing sign, the railroad track and the train itself. He could see the train from the time he came within 800 feet of the crossing. He could see the sign from the time he came within 500 feet of the crossing. He could see the track from the time he came within 200 feet of the crossing. He nevertheless drove onto the crossing in front of the train and was killed. We conclude that he was guilty of contributory negligence as a matter of law."

For later decisions of the Washington State Supreme Court see:

Hopp v. Northern Pac., Wash., 147 P. (2d) 951; Morris v. C. M. St. P. & P., Wash., 87 P. (2d) 119, 100 P. (2d) 19.

One of the later cases from Utah, a jurisdiction cited by our court in the *Pollard* case, is *Holmgren v. Union Pac. Ry. Co., 198 P. (2d) 459,* decided October 13, 1948, affirming a judgment of nonsuit and involving a daytime afternoon accident. U. S. Highway No. 91 ran parallel with the railroad tracks. An oil road led from Highway No. 91 over said tracks at a slight angle. Plaintiff, familiar with the crossing, followed two ambulances from Highway No. 91 toward the crossing. He was going 10 to 12 mph. At the same time a train approached at a speed of about 40 mph. A motorist had a fairly good view along the tracks for most of the road distance to the tracks, although there were partial obstructions. It was undisputed that for a distance of 30 to 35 feet from the tracks he had an unobstructed view along the tracks for 4,000 feet. He was struck by the engine when he drove in front of the approaching train. The court first discussed and held plaintiff guilty of contributory negligence as a matter of law. It then discussed the doctrine of last clear chance and held no liability as a matter of law under this doctrine, where the plaintiff, while approaching the position of danger, had the duty to look and the same opportunity to avoid the accident by the exercise of ordinary care as did the defendant railroad.

With reference to the rights of the train crew observing the motorist approach, the court said:

"The rules stated in the above quoted authorities are followed in this jurisdiction. In the recent case of Van Wagoner v. Union Pac. R. Co., Utah 186 P. 2d 293, 302, we said, speaking through Mr. Justice Latimer:

" 'The engineer or other members of the train crew could assume the deceased would stop until he was so close to the track that a reasonable person would know otherwise. Undoubtedly when deceased cleared the one tree some 20 feet from the crossing, it would be apparent that he did not intend to stop. Disregarding the testimony of two members of the crew that when they did see the truck clear this tree they gave the emergency signal, appellants' evidence only permits one or two seconds for the train crew to have taken the necessary steps to have prevented the accident. This is not giving the defendant the last clear chance. The *opportunity to avoid the accident must not be a possibility; it must be a clear opportunity.* Not even by speculation could the jury reach a verdict on the theory that the train crew had time to appreciate that deceased was negligent and that by reasonable means they could have avoided the ensuing collision. *When, as in this jurisdiction, a train has the preferred right of way, its operator is entitled to assume the driver of a car will yield to this preferment, and if the doctrine of last clear chance is to be invoked, it must clearly appear that time permitted the train crew to appreciate deceased's predicament, and to give warnings sufficiently early enough for the deceased to extricate himself, or the time element was sufficent to permit the crew to bring the train to a stop.* No such showing was made here.' (Italics added.)"

California was cited and relied upon by our court in the Pollard case. The facts in *Lindley v. Southern Pacific, Cal., 64 P. (2d) 490,* were very similar to those in

this case. There was a daytime accident at a country crossing. The tracks ran east and west. About 150 feet to the north, a paved public highway paralleled the tracks. A dirt road, 20 feet wide, ran southerly from the highway sloping down as it left the highway and sloping up as it crossed the tracks at 54 degrees. The lowest point of the road was 5' below tracks at 50 feet from the tracks. At 25 feet from the tracks, the road was 3 feet below. The surrounding country had some desert growth. Plaintiff had lived south of the crossing for eight years and was familiar with it. The train was traveling 35-40 miles per hour. The car was going 4-5 miles per hour. The fireman saw the car 50-60 feet from the track. When the car was 10-12 feet from the track, the fireman realized it would not stop. The engine struck the car. Four truck drivers testified the engine bell and whistle were not sounded. The court held the plaintiff negligent as a matter of law and last clear chance inapplicable as a matter of law. With reference to last clear chance, the opinion holds:

> "The only other point raised is that even if the deceased was guilty of contributory negligence the doctrine of last clear chance applies and the matter should have been submitted to the jury. It is argued that when the deceased was 10 or 12 feet from the track the fireman realized that he was not going to stop, that the deceased could have stopped instantly at any time while he was traversing that 10 or 12 feet had he been warned of the approach of the train by the sounding of a whistle, and that the respondents had the last clear chance to avoid the accident by sounding the whistle during that time. It is equally

true that the deceased could have avoided the accident by looking at any time during the same period. The fireman had a right to assume that the deceased would stop, especially since he slowed down shortly before reaching the track. When the fireman realized that the deceased was not going to stop the train was so close to the crossing that it was a matter of split seconds. It was the natural thing for him to think first of the application of the brakes and to act to that end. If, after calm reflection, it may be said that it would have taken an appreciable part of the time available, it cannot be said that any chance which the fireman had to avoid the accident was a clear chance. Without taking the time to review the authorities we are satisfied that the doctrine of last clear chance had no application under the facts of this case, as presented by the record before us. (Citing cases.)

"After reading the entire record, we are of the opinion that the negligence of the deceased was of a nature which will not permit of a recovery in this case under any theory permitted by the established law of this state."

For similar holdings under similar fact situations see the following decisions from those other jurisdictions cited and relied upon in the *Pollar* cases.

Iowa:

Mast v. Illinois Cent. Ry. Co. 8th cl, 176 F. (2d) 157;

Hitchcock v. Iowa Southern Utilities, 6 N.W. (2d) 29;

N.C.:

Riddle v. So. Ry. Co., 4th C. C., 114 F. (2d) 259;

Redmon v. So. Ry. Co., 143 S.E. 829;

Stevens v. So. Ry. Co., 75 S.E. (2d) 232;

Va.:

Elec. & Power Co. v. Vellines, 175 S.E. 35.

One of the latest decisions in Montana on last clear chance is that of *Sorrels v. Ryan, Mont. reh. den. March 31, 1955, 281 P. (2d) 1028, Mont.* It involves the sufficiency of the complaint in a pedestrian-auto case and does not apply to or affect, the rules of law applicable at a railroad crossing. Between the opinion in chief and the per curiam statement on rehearing it appears that under the pleading the pedestrian had crossed one-half the street, then proceeded over the far half into the lane of travel and danger directly in front of the approaching vehicle when the driver had time to turn out, pass around, and avoid the accident. With reference to the *Pollard* case, the court simply said in its opinion in chief at page 1030:

> "Plaintiff relies largely on the case of Pollard v. Oregon Short Line Ry., 92 Mont. 119, 11 P. 2d 271.
>
> "That case established the rule in this state that the doctrine of last clear chance has application to a case not only where defendant actually saw plaintiff in a position of peril in time to avoid the injury by the exercise of reasonable care but also to a case where in the exercise of reasonable care he should or could have discovered plaintiff in his perilous position in time to avoid the injury. True that was a case where the injury arose at a railroad crossing where there was a clear legal duty on the part of those operating trains to keep a lookout."

The latest decision in Montana considering last clear chance is *Burns, Administrator v. Fisher, Cause No. 9469, decided June 9, 1955, ... Mont. ....., ... P. (2d)* ..... In that case, deceased was operator of a Ford truck stalled on a highway at night. The rear lights of the

stalled truck were on, but no flares were put out. The rear of the cab was obstructed by a tool shack being transported. Deceased sat in cab. He could not be seen in the truck by an overtaking driver. A motorist passed the stalled truck shortly before the collision. Defendant's truck was overtaking the stalled truck at the same time two oncoming cars approached. The opinion stated that defendant's driver did not in fact see the stalled truck until the impact. Judgment of nonsuit was granted. The Supreme Court affirmed stating that there was no evidence of want of care on the part of the defendant driver; that death of the decedent was due to and proximately caused by his own negligence; and in answer to the contention that under the *Pollard* and *Armstrong* cases defendant should be liable under last clear chance, the court said that even assuming defendant driver should have seen the truck, he could not see or know that anyone was in the truck. The court held:

> "This case does not present or justify application of the doctrine of last clear chance."

In addition to the foregoing cases, we call attention of the court to a few cases representative of the view of courts in other jurisdictions.

For example, the facts in *Mundt v. C. R. I. & P. Ry Co., Neb., 286 N.W. 691,* show partial obstructions on the approach by reason of cuts, growing corn, and weeds. Plaintiff lived near, and was familiar with, the crossing. After holding the plaintiff negligent as a matter of law, the court said on last clear chance:

In addition to the foregoing cases, we call the attention of the court to a few cases representative of the view of courts in other jurisdictions.

"It must be considered also that the last act necessary to avoid the accident was that of stopping the automobile, an act which the plaintiff alone could perform. The defendants acting alone could not have avoided the accident. The plaintiff's position in and of itself, prior to and when discovered by defendants' brakeman and fireman, was not one of peril. The defendants cannot be charged with negligence for having failed to see him before that time. Had they seen him prior to that time, they had no reason to expect that he would not stop. It is the common practice of drivers to approach within a few feet of a crossing before stopping for a train to pass. It is not a common practice for drivers to stop at distance of more than 70 feet from a crossing. Had the defendants seen the plaintiff prior to the time they did, they had the right to expect him to do the ordinary act of stopping his automobile. Plaintiff's speed was not excessive at any time and was not such as would have caused alarm to defendants had he been discovered prior to the time he was seen. The peril was one that was caused by the negligent act of the plaintiff in continuing to approach the crossing without looking to the west, when to have done so would have disclosed his danger to him in time for him to have stopped his car.

"From the time that plaintiff's peril was discovered there was not sufficient time to avoid the accident and the defendant company and its agents did not have the ability at that time to avoid the impending collision. It necessarily follows that the doctrine of the last clear chance does not apply in this case."

To the same effect are:

A. C. L. R. Co. v. Glenn, S. Car., U. S. Ct. of App., Fourth Circuit, July 28, 1952, 198 F. (2d) 232;

Clark v. B. & O. R. Co., Ohio, U. S. Ct. of App., Sixth Circuit, April 10, 1952, 196 F. (2d) 206;

C. St. P. M. & O. Ry. Co. v. Heyda, Minn., U.S. Ct. of App., Eighth Circuit, Nov. 2, 1951, 191 F. (2d) 944;

A. T. & S. F. v. Herbold, 10th C.C., 169 F. (2d) 12;

Hopkins v. Kum, Mo., applying Oklahoma law, 171 S.W. (2d) 625;

Bishop v. Atl. Coast Line R. Co., S. C., 48 S.E. (2d) 620;

Gates v. B.J.M. R., N.H., 37 A. (2d) 474; Peterson v. B. & M. R., Mass., on N.H. accident, 36 N.E. (2d) 701;

Jursic v. P. & L. E. R. Co., Pa., January 12, 1954, 102 A. (2d) 150;

Ekgren v. M. St. P. & S. S. M. R. Co., N.D., November 19, 1953, reh. den. December 4, 1953, 61 N.W. (2d) 193;

South. Ry. Co. v. Feldaus, Ky., June 12, 1953, reh. den. October 30, 1953, 261 S.W. (2d) 308;

Hicks v. N. P. Ry. Co. et al, Minn., May 29, 1953, reh. den. June 16, 1953, 58 N.W., (2d) 750;

George Siegler Co. v. Norton, N.J., Jan. 21, 1952, 86 A. (2d) 8.

It is undisputed in this case that both parties approached simultaneously to the point of impact. It is undisputed that the automobile had a total stopping distance including reaction time of 14-3/4 ft. to 33-1/2 ft., or in time between 1 second and 1.51 seconds from the crossing. The railroad train, however, had a stopping distance of 500 to 680 ft. When the jeep was at its stop-

ping distance of 14-3/4 to 33-1/2 feet, or 1 to 1.51 seconds from the crossing, the train was 66.37 feet to 110.5 feet from the crossing. Of that distance 80 feet is required after train brakes were applied before braking action even started. Under such circumstances where is there any evidence to indicate that at the moment the plaintiff was in any danger zone, that this defendant had at any time thereafter an opportunity to see, react, and take the steps that would avoid this accident; that this defendant at that moment when the automobile driver was in any danger zone had time for thought, appreciation, and mental direction. In other words, where is there any evidence that this defendant had the last clear chance. It seems clear, that under circumstnces such as these, it was the automobile driver himself who had the only last clear chance to avoid such an accident.

c. IN ANY EVENT CONTINUING CONTRIBUTORY NEGLIGENCE BARS RECOVERY.

Montana has consistently followed the rule that even in a proper case for the application of last clear chance, a plaintiff is barred if his negligence continues concurrently with that of the defendant to the moment of impact.

In the *Pollard* case, our court recognized that concurring negligence is a bar in Montana. The court said:

> "It is true that this court has recognized the rule that, where an accident is the result of negligence of the plaintiff concurring with the primary negligence of the defendant up to and producing the injury, there is no room for the application of the last clear chance doctrine * * *" *(92 Mont. at 132.)*

In the *Melzner* case, the court said:

> "For the purposes of this case we may agree with counsel for appellants that, if the negligence of plaintiff concurs with that of the defendant up to and producing the injury, no recovery can be had, for under such circumstances there could not be room for the application of the doctrine of the last clear chance;" *(Melzner v. N.P., 46 Mont. at 181, 127 Pac. 146.)*

Appellant in his brief states that his really serious objections pertain to the special requests on the negligence of deceased *(Br., Pp. 21);* that the instruction on continuing, concurring contributory negligence cannot be reconciled with last clear chance; and, after quoting from the *Mihelich* case, that "it would appear, therefore, that the Montana courts agree that the theory of contributory negligence has no application in a last clear chance case where no other issue has been raised." *(Br., Pp. 22).* At page 19 of his brief, appellant supports his recitation of the situations which permit recovery under the doctrine of last clear chance with a reference to *1944 Montana Law Review, page 12.* That law review article consisted of a very thorough and well considered discussion by Professor J. Howard Toelle entitled "Montana Applications of the Last Clear Chance Doctrine." It was divided into three segments—first, Historical Background, in which was discussed the "helpless peril" situation covered by *Section 479 of the Restatement of Torts* and the "mentally inattentive plaintiff" situation covered by *Section 480 of the Restatement;* second, Montana decisions; and third, a discussion of the Future of the Doctrine. After reviewing all Montana decisions the

article came to the *Pollard* and *Armstrong* cases, at which the following significant discussion appears:

"In Pollard v. Oregon Short Line R. R. Co., plaintiff's complaint contained both a count in primary negligence and a last clear chance count. At the close of plaintiff's evidence, plaintiff withdrew the first count, and the case proceeded under the theory of the last clear chance. (Discussing the case.) * * *

"It is believed that the case was properly disposed of on the record. Plaintiff was suing for personal injury; he was so absorbed in the checking of the coils that he failed to note the coming of the train; in other words, the case was one of mental inattention rather than of helpless peril. Accordingly, defendant's duty arose only based on actual discovery. * * *

"In Armstrong v. Butte Ry. Co., * * * (Discussing the case). The case is notable in that it is the first Montana case citing the last clear chance provisions of the Torts Restatement. It is also notable in that together with the Pollard case, it marks a definite overruling of the language used in a long line of Montana cases in which the actual discovery or conscious last clear chance rule had been enunuciated as the Montana doctrine. Now we are told that the unconscious last clear chance doctrine is also applied in proper cases. The two decisions will be hailed with satisfaction by the profession as aligning the court with the weight of authority and the 'enlightened' view. However, it is to be hoped that the court will not now move to the extreme of the humanitarian doctrine. There may be some excuse for some trepidation at this point owing to a statement in the Armstrong case at page 136 of 110 Montana referring to the last clear chance doctrine as 'what is usually referred to as the humanitarian doctrine.' Also by the statement in the Pollard case at page 133 of 92 Montana:

" 'Many cases, on the fact conditions shown, indi-

cate or declare that the continuing contributory negligence of the injured party takes the case out of the rule of the last clear chance, unless it is shown that for some reason he is in a position wherein it is physically impossible for him to extricate himself; but this is not in accord with the declarations of this court in the Neary and Doichinoff Cases . . .'

"Now it is submitted that the continuing contributory negligence of the injured party does take the case out of the last clear chance rule. At any rate, this is the weight of authority and Restatement view. If the plaintiff is mentally inattentive—'continuing contributory negligence'—and defendant fails to discover plaintiff's condition of inattention, they are both in fault—both equally mentally inattentive—and neither should have a cause of action against the other. But, if plaintiff is reduced to a condition of helpless peril ('physically impossible for him to extricate himself'—non-continuing contributory negligence), and the place is one where defendant was under a duty to keep a lookout which duty was breached, then defendant's liability attaches.

"These principles are not contra to the decisions in the Neary and Doichinoff cases where, as previously indicated, the court was actually dealing with negligently inattentive plaintiffs and properly on the record affirmed the judgments on the ground of actual discovery by defendant of the other's mental inattention in time to avoid the accident."

As indicated, appellant quotes from the *Mihelich* case as authority for his view that no instructions can be given on contributory negligence in a last clear chance case. *(Br. Pp. 22, 23.)* The complaint in the *Mihelich* case had contained three causes of action—one for ordinary negligence, one for wilful and wanton injury, and one for last clear chance. The answer contained a separate affirmative defense which concluded "that by reason of

plaintiffs' contributory negligence he cannot be heard to complain of or against plaintiffs." No reply was filed; default was entered; and the trial court granted a motion for judgment on the pleading. With that background the full quotation from which appellant quotes only a part states:

> "Are the pleadings in such condition as to warrant the judgment entered? In so far as the first count—plaintiff's ordinary action for damages for an injury alleged to have resulted from defendants' negligence in a complete defense; the allegations of the separate affirmative defense became, in effect, an agreed statement of facts and the trial court had no authority to look to the complaint for any purpose, —it was commanded by the statute to enter such judgment as the defendants were entitled to 'upon the statement.' (Citing cases.) The judgment must stand as to the first count, unless the plaintiff was entitled to have the default set aside on his showing made prior to motion for judgment.
>
> "However, a different situation exists as to the second and third counts, if they, respectively, state a cause of action on the last clear chance doctrine, and charge a wilful and wanton injury, for no amount of negligence on the part of a pedestrian will justify a driver in deliberately running him down, and no manner of negligence on the part of an injured person is a defense where the injury resulted from the wilful or wanton act of the defendant (Neary v. Northern Pac. Ry. Co., 37 Mont. 461, 19 L.R.A. (n. s.) 446, 97 Pac. 944; 46 C. J. 981, and long list of cases cited), and 'in this state it is not fatal to the complaint that contributory negligence on the part of the plaintiff appears and a plea of contributory negligense is not a defense, if the action is brought upon the theory that, notwithstanding such negligence, the defendant has the last opportunity to avoid the injury and failed to exercise it.

The rule of pleading in cases which do not invoke the doctrine of the last clear chance does not have any application in * * * (a) case which depends entirely upon that doctrine.' (Melzner v. Northern Pac. Ry. Co., 46 Mont. 162, 127 Pac. 146, 150.) The last clear chance doctrine presupposes negligence on the part of both the plaintiff and defendant, and plaintiff's contributory negligence is admitted by the allegations of his second and third counts. *The allegations of the separate defense, therefore, but joins issue as to the manner in which the accident happened and could have been proven under the general denial; no reply, as to the causes of action alleged in the second and third counts, was necessary." (Mihelich case, 85 Mont. at 616-617.)* (Italics supplied.)

The foregoing does not justify the conclusion drawn by appellant. The remainder of the decision does not justify the conclusion. With respect to contributory negligence as a defense to last clear chance, the *Mihelich* case therafter holds:

"Thus negligence which cannot be traced as the proximate cause of the injury does not create liability, and even though the defendant is shown to have been guilty of actionable negligence and it is shown that such negligence was not the *sole* proximate cause of the injury for the reason that the negligence of the plaintiff contributed as a proximate cause, no recovery may be had; but even here plaintiff's own negligence will not bar a recovery unless it existed as a concurrent, co-operating proximate cause of the injury. (Citing Montana case.) Thus it is clear that the key to liability is: what act or acts of negligence constitute the proximate cause of the injury, without which it would not have occurred? All other acts of negligence become immaterial.

"Presupposing, then, that both plaintiff and defendant are guilty of negligence and thereafter the

plaintiff remains passive and oblivious to his danger, and the defendant, after discovering the perilous situation of the plaintiff, could have avoided the accident by the exercise of reasonable care but did not employ the means at his command to avoid it, there is a break in the sequence of events and defendant's last act of negligence becomes the sole proximate cause of the injury, while his initial negligence and the primary negligence of the plaintiff become but remote causes thereof. (Citing Montana cases.)

"Here, knowledge and appreciation of plaintiff's peril in time to avoid the threatened injury, has been said by this court to be necessary in order to invoke the doctrine under consideration. (Citing Montana case.) *Even here the doctrine of contributory negligence is applicable,* (Italics supplied) and if the negligence of plaintiff concurs as a proximate cause up to and at the time of the accident, the last clear chance doctrine does not apply, since defendant's subsequent negligence is not then the *sole* proximate cause of the injury. (Citing Montana case.) If the plaintiff could, at the last, have avoided the injury by the exercise of reasonable care, in spite of the subsequent negligence of the defendant he has failed to embrace 'the last clear chance'. * * *" *(85 Mont. 618-619.)*

Appellant has abandoned his objections to Defendant's Special Request No. 13. At the time of trial he urged on the trial court the Montana case of *Yergy v. Helena Light & Ry. Co., 39 Mont. 2399, 102 Pac. 317 (T. 360).* In that early case, the court did not condemn or deny the defense of concurring contributory negligence. The court said in part:

"We are of opinion that all the instructions, taken together, left the jury free to consider the defense of contributory negligence, and that they must have understood from the instructions given that there

> could be no recovery unless the doctrine of last clear chance could, under the testimony, be successfully invoked by the plaintiff."

There simply is no justification or authority for the conclusion drawn by appellant that the doctrine of contributory negligence is not applicable in Montana in a last clear chance case.

Although appellant states that he does not contended that Montana has extended the last clear chance doctrine to include the Humanitarian Doctrine *(Br. Pp. 23),* a doctrine condemned in the Montana Law Review article quoted above, the cases he cites are from Missouri which does follow that doctrine. We recognize that in Missouri, the Missouri court has held that no negligence of the plaintiff can be a defense under its Humanitarian Doctrine. Such cases have no significance in Montana which does not follow the Humanitarian Doctrine, particularly where the Montana court has held to the contrary. The situation peculiar to Missouri is succinctly stated as follows:

> "Apparently in that state nothing short of intended suicide on the part of the injured person will prevent recovery against defendant chargeable with subsequent negligence as distinguished from primary negligence." *(171 A.L.R. at 413.)*

Accordingly, although appellant says that he does not contend thatMontana has extended the last clear chance doctrine to include the Humanitarian Doctrine of Missouri *(Br. Pp. 23),* the cases he cites are from Missouri, and his argument in effect is that this court should reverse the Montana law as applied by the Montana court,

and adopt the Missouri law as applied by the Missouri court.

The A.L.R. article quoted above is of further interest in this case. It is a collected annotation of last clear chance divided into four categories of fact situations. The fourth category is the fact situation of this case—a negligently inattentive plaintiff. The article states:

> "Fourth category: danger not actually discovered by defendant but ought to have been; injured person physically able to escape (Supplementing 92 ALB 128 and 119 ALR 1075.)
>
> "It is stated in connection with footnote 69a of the comment note, in 92 ALR 128, and page 1075 of the supplementary annotation in 119 ALR, that the logical implication of the proximate cause view of the doctrine of last clear chance seems to require denial of its applicability in the situation hypothesized in this category and that the great weight of judicial authority is to that effect. Further support for denial of application of the doctrine upon the hypothesis of this category is furnished by later cases." *(171 A.L.R. at 403.)*

We can simply paraphrase the opinion of this court in *Great Northern v. Taulbee,* above, and it should decide this case:

> "Whether or not appellee also was negligent, or whether its negligence, if any, concurred with Feeley's in causing the collision, it is unnecessary to decide. Feeley's negligence, if not the sole cause, was at least a proximate cause of the collision. Whether it was the sole cause, or was a concurrent cause amounting to contributory negligence only, is immaterial. In either case, recovery is barred. Appellee's motion for a directed verdict should have been granted."

Under the identical Montana authority cited by appellant, the Montana law expressly recognizes continuing contributory negligence as a complete defense.

Under the undisputed evidence, under the Montana decisions, and under the decisions of this court, Feeley's continuing concurring negligence at least proximately contributed to cause his death. The directed verdict should have been granted.

THERE WAS NO REVERSIBLE ERROR IN THE CHARGE TO THE JURY

The only basis of appeal to this court is alleged errors in the charge to the jury. Although we feel that appellee was entitled to a directed verdict, and that it is therefore unnecessary to consider this assignment of error with respect to the charge of the court, we respectfully submit that in any event there was no reversible error. If there was error, it was error in favor of the appellant for which the appellant cannot complain.

It is well to summarize a few basic rules with respect to the charge to a jury. In the first place, particular instructions cannot be singled out, but the charge must be considered together as a whole to determine whether upon the whole charge the jury could gather the proper rules to be applied.

No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, "stating distinctly the matter to which he objects and the grounds of his objection" *(Rule 51)*.

Ordinarily, error will not be premised on the failure to give an instruction where the practice has not been followed of submitting a desired instruction to the court in writing in advance of the conclusion of the trial in order that the trial court may have an opportunity to review it. *(Swiderski v. Moodenbaugh, 9th C.C., 143 F. (2d) 212.)*

Specifications of error on grounds not presented to the trial court cannot be considered on appeal.

In these cases, the pleadings of the appellant, both complaint and reply, were bottomed solely on the doctrine of last clear chance, and the case was tried on the theory of last clear chance. The appellant did not offer orally, or in writing, any special requests or instructions defining, limiting, or including all of the elements of the doctrine of last clear chance, or any or all of the elements of the defense of continuing and concurring negligence. He contends there is no such defense. He did not offer instructions that would clarify the alleged errors, if any, in those instructions which were offered by the appellee and given by the court, nor did he point out distinctly to the court the matter within those instructions offered by the appellee and given by the court to which he objected. He was satisfied to offer a few instructions which adequately and fully covered his theory of possible liability to an approaching motorist, all of which were given. He cannot now place the trial court in error, assuming that there was error, for his own failure to offer full and complete instructions, for his own failure to point out to the court distinctly any matter that may have been erroneous-

ly included, or for his own failure to suggest to the court any additional matter that would clarify or amplify those given.

a. PROPER CAUTIONARY INSTRUCTIONS WERE GIVEN.

The jury was told to consider the instructions as a whole, each in the light of the other, and not to single out or decide the case on some particular instruction *(Def. Spec. Req. 1, T. 337);* to take the law of the case from court and the instructions of the court only *(Def. Spec. Req. 3, T. 337).* Preponderance of the evidence was defined *(Def. Spec. Req. 10 and 11, T. 341);* proximate cause was defined *(Def. Spec. Req. 12, T. 342);* negligence was defined *(Def. Spec. Req. 13, T. 342);* and circumstantial evidence was defined *(Plaintiff's Instruction No. 4, T. 353, and No. 13, T. 356).*

b. THE CHARGE, CONSIDERED AS A WHOLE, COVERED THE ESSENTIAL ELEMENTS OF LIABILITY TO AN INATTENTIVE PLAINTIFF UNDER LAST CLEAR CHANCE.

The basic elements of last clear chance that would permit recovery by a negligently inattentive plaintiff are set out above in the quotation of Section 480 of the *Restatement of Torts.* A negligently inattentive plaintiff can recover:

"* * * if, but only if, the defendant

a. knew of plaintiff's situation, and
b. realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and

c. thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

In our opinion, the elements required were fully covered when we read together, as we must, defendant's special requests 16 through 20 *(T. 343-345),* and plaintiff's offered instructions 9, 11, 12, 13 and 14 *(T. 354-357).* In connection with the position of peril or perilous situation, or position of danger, and the discovery thereof, the jury was told that it could consider circumstantial evidence *(Pl. Ins. 4 and 13, T. 353 and 356);* that the duty of the train crew did not arise solely when deceased was on the track, but also if his danger was apparent while he was approaching the track *(Pl. Ins. 12, T. 356);* that in determining whether the train crew saw the deceased in time to avert the injury, the jury could consider whether the crew was in a position from which they could have seen that the deceased was inattentive and unaware of the approaching train, and the train crew was presumed to have seen what was in plain sight to be seen *(Pl. Ins. 9, T. 354).* The jury was also told that they must find for the plaintiff and against the defendant even if the deceased could have observed the danger, if there was anything in his demeanor or conduct from which the train crew knew of the situation, and had reason to realize he was inattentive and unlikely to discover, or might not discover his peril; or if the train crew observed circumstances indicating a reasonable chance that deceased was inattentive and therefore in danger, or might not dis-

cover his danger, then the train crew was obliged to take reasonable steps to protect him *(Pl. Ins. 11, T. 355).* Furthermore, the jury was told that if circumstances indicated that the deceased was unaware of his danger, and the unawareness was discovered by the train crew in time to avoid the collision, "then *must find"* in favor of the plaintiff *(Pl. Ins. 11, 12 and 13, T. 355-357).* Finally, that signals were required of the train crew, and any failure to give them was negligence; but even if signals were given, if the train crew observed they were not heard by Feeley, or the train not discovered, they were required to give additional signals; that if they failed to give them, and giving them would have saved Feeley, "then you must return your verdict in favor of plaintiff" *(Pl. Ins. 14, T. 357).*

When you read the foregoing instructions offered by the plaintiff, and given by the court, in conjunction with the special requests offered by the defendant and given by the court, it seems clear that the jury was told that plaintiff could recover, even though inattentive and unaware, and even though at all times approaching the impact, if the defendant

"a. knew of plaintiff's situation, and

b. realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid harm, and

c. thereafter was negligent in failing to utilize with reasonable care and competence the defendant's then existing ability to avoid harming the plaintiff."

c. SPECIAL REQUESTS OFFERED BY THE DEFENDANT APPELLEE AND GIVEN BY THE COURT, DID CORRECTLY STATE THE LAW. IN ANY EVENT, APPELLANT IS IN NO POSITION TO COMPLAIN IN THIS COURT.

The objections made by appellant to the crucial instructions offered by the defendant with respect to last clear chance and continuing contributory negligence *(Def. Spec. Req. Nos. 16-26, inclusive),* are set out at pages 361-364 of the Transcript. In our opinion, the appellant failed to state distinctly to the trial court the matter in the instructions to which he objected, or the grounds of objection, assuming they were objectionable. Furthermore, the plaintiff appellant failed to submit to the trial court, either orally or in writing, instructions that would correct the errors, if any, in those special requests, or that would clarify the additional matters which the appellant felt were either adequately covered, or erroneously covered. The objections are legally insufficient to warrant reversal.

Swiderski v. Moodenbaugh, 9th C.C., 143 F. (2d) 212.

Tucker v. Loew's Theatre & Realty Corporation, 2nd C.C., 149 F. (2d) 677.

Armit v. Loveland et al, 3rd C.C., 115 F. (2d) 308.

Mill Owners Mutual Fire Insurance Company v. Kelly, 8th C.C., 141 F. (2d) 763.

Rule 51, Federal Rules of Civil Procedure.

Woodworkers Tool Works v. Byrne, 9th C.C., 191 F. (2d) 667.

Mutual Life Insurance Company v. Wells Fargo

Bank & Union Trust Company, 86 F. (2d) 585, 9th C.C.

Allison v. Standard Air Lines, 9th C.C., 65 F. (2d) 668.

Allen v. Nelson Dodd Produce Company, 207 F. (2d) 296, 10th C.C.

New York, New Hampshire & H. Railway Company v. Zermani, 1st C.C., 200 F. (2d) 240.

Fritz v. Pennsylvania Railroad Company, 7th C.C., 185 F. (2d) 31.

Hansen v. St. Joseph Fuel Oil & Manufacturing Company, 8th C.C., 181 F. (2d) 880.

Palmer v. Hoffman, 318 U.S. 800, 63 S. Ct. 757.

In considering whether the charge to the jury as a whole advised the jury of the proper rules to apply, we call the attention of the court to the fact that the special requests offered by the defendant appellee covering both the elements of the doctrine of last clear chance, and contributory negligence continuing up to the moment of impact and concurring with the negligence, if any, of the defendant, were based substantially on the charge that was actually given to the jury by the trial court in the trial of the *Pollard* case, and considered by the Montana Supreme Court on the appeal in that case. We have obtained certified copy of that charge from the Clerk of the Montana Supreme Court, and extract therefrom is included in this brief as an appendix to assist the court in considering the charge. The court may likewise be interested to note that Judge Pray during the trial of this case considered over night what his charge would be *(T. 329-330)*. His consideration included the transcript on

appeal in the *Pollard* case, and the charge in that case included herein in the appendix. The record in this case states:

> "THE COURT: I am returning this transcript, Mr. Crowley." *(T. 331).*

The transcript referred to was that of the transcript on appeal in the *Pollard* case.

We shall consider the specifications in the same order as in appellant's brief.

(1) The first part of Defendant's Special Request No. 17 *(T. 343)* is substantially identical with Instruction 9 of the Pollard case *(App., Pp. 4)*. The only addition is a definition of zone of safety and position of peril as described in the *Holmgren* case, *(Pp. 29, herein)*, Utah, and the *Lindley* case, Calif. *(Pp. 30, herein)*, which are not objected to. The objection made was simply that it was misleading; an instruction for the helpless peril type of last clear chance, and not applicable in its entirety to the negligent inattention theory *(T. 361)*. These grounds are general and do not comply with the requirements of Rule 51, or the decisions of this court. In any event the instruction must be read and considered together with Plaintiff's Instructions 4, 9, 11, 12, 13 and 14 *(T. 353-357)*. Finally, appellant did not offer any instruction which he felt was proper.

(2) Defendant's Special Request No. 19, *(Tr. 344)*, considered in conjunction with Plaintiff's Offered Instructions No. 9 *(T. 354)*, No. 11 *(T. 355)*, No. 12 and No. 13 *(T. 356)*, and No. 14 *(T. 357)*, cover the same

ground as Instructions 12 and 13 of the *Pollard* case *(App., Pp. 5, 6)*. The objection *(T. 361)* that it was an incorrect statement of the law and misleading is insufficient. By Plaintiff's Instruction 14 *(T. 357)* the jury were told that failure to give whistle or bell signals was negligence per se; that even if they were given, if any of the train crew observed they were not heard, or the train was not discovered, additional signals were required; and if the death could have been avoided if the signals were given, then their verdict *must* be for plaintiff *(T. 357)*. Plaintiff's 3 *(T. 353)*, which we think imposed a greater duty on appellee than the law requires, Plaintiff's 9 *(T. 354)*, and Plaintiff's 11, 12, and 13 *(T. 355-356)* also fulfill the objections made. Again, appellant offered no instruction of his own to assist the court.

(3) Defendant's Special Request No. 20 *(T. 345)* is word for word the last half of Instruction 10, *Pollard* case *(App. 4)*. The first half of Instruction 10, *Pollard* case, is Defendant's Special Request No. 18, objection to which has been abandoned *(T. 344, App. 9)*. The single instruction of the *Pollard* case was simply divided into two instructions. The same comments pertain here concerning reading the instructions along with those of plaintiff and the other special requests.

(4) Defendant's Special Request No. 21 *(T. 345)* on continuing and concurring contributory negligence is substantially the last half of Instruction No. 11 of the *Pollard* case *(App., Pp. 5)*. The appellant specifies

as error grounds not given to the trial court. *(Br. Pp. 7; T. 362).* The objection made is substantially that there can be no defense of contributory negligence in a case of last clear chance *(T. 362).* The objection was neither sufficient, nor sound.

(5) Defendant's Special Request No. 22 *(T. 346)* is identical with Instruction No. 14, Pollard case *(App., Pp. 6),* and must be considered in conjunction with Defendant's Special Request No. 21 *(T. 345).* The appellant specifies as error grounds not presented to the trial court *(Br., Pp. 8, T. 363).* The objections that there can be no such defense, that it is misleading, and an incorrect statement of the law, are simply general and legally insufficient as well as unsound. *(T. 363.)*

(6) Defendant's Special Request No. 23 *(T. 346)* is substantially identical with Instruction No. 15 *Pollard* case *(App. Pp. 7).* Appellant specifies grounds not presented to the trial court *(Br., Pp. 9; T. 363).* The instruction must be considered along with Request 21 *(T. 345).* The objection that it is an incorrect statement of the law, applies only to primary negligence, confusing, misleading, and not applicable, are not sufficient objections. Furthermore, appellant did not offer what he would consider a correct charge, nor point out distinctly the matter in the charge to which he objected, nor in what way the court should modify or restrict the instruction.

(7) Defendant's Special Request No. 24 *(T. 347)* is

identical with Instruction No. 16, Pollard case *(App., Pp. 8)*. Again, only a general objection was made that it assumes facts not in evidence, and therefore was misleading; that it was inapplicable in an inattentive motorist situation, and could be given only in a primary negligence case *(T. 363)*. These objections do not comply with Rule 51. Furthermore, when read with plaintiff's instructions 3, 9, 12, 13, and 14 *(T. 353-357)*, the objections have no merit.

(8) Defendant's Special Request No. 25 *(T. 349)* was based upon *Grant v. C.M., 78 Mont. at 112-113; Heintz v. So. Pac., Cal., 147 P. (2d) at 621;* and *Incret, 107 Mont. at 414*. It must, of course, be read and considered with all instructions. Appellant specifies grounds of error not presented to the trial court. He inadvertently overlooked setting out the objections in his brief *(Br. P. 12)*. His objection was simply for the same reason he objected to Request 24, and the same comments are pertinent *(T. 364)*.

(9) Appellant apparently inadvertently overlooked specifying error as to Defendant's Special Request No. 26 but did include the transcript objections to it *(Br. Pp. 13)*. Defendant's Request No. 26 *(T. 349)*, was based upon Instructions 10 and 12 of the Pollard case *(App., Pp. 4, 5);* the comments to *Section 480, Restatement of the Law of Torts;* the *Holmgren case, 198 P. (2d) 459 (Pp. 29, herein);* the *Lindley case, Calif., 64 P. (2d) 490 (Pp. 30, herein);* and *N. P. v. Haugan, 8th C.C., 184*

F. (2d) at 477, which approves this instruction:

> "The court instructed the jury in part as follows: 'The employees of the defendant had a right to assume that persons in the act of crossing its railroad would use ordinary care for their own safety; and, when a train was in sight of a grade crossing, that persons approaching on a public street or highway would stop.'"

The objections were simply general—incorrect statement of the law; the trainmen must act as reasonably prudent men when they have discovered an inattentive motorist; the instruction considers only ordinary negligence, that is primary negligence type case, and does not contemplate an action under last clear chance *(Br. Pp. 13, T. 364),* and legally insufficient.

(10) Appellant's specification of error numbered 9 *(Br. Pp. 13)* was not made to the trial court and cannot be considered here.

d. SUMMARY.

We respectfully submit that the instructions when read together adequately cover all the elements of last clear chance that appellant desired, or now insists upon; that the defendant's special requests correctly stated the Montana law; but that in any event, the objections of the appellant did not comply with Rule 51, and appellant did not offer in writing what he considered to be proper instructions, and he is in no position to complain in this court.

CONCLUSION

We respectfully submit the judgment should be affirmed for two reasons:

(1) Under the undisputed facts, and the undisputed state of Montana law, appellee should have been granted a directed verdict.

(2) The charge to the jury, considered as a whole, gave to the jury the proper rules to be applied. There was no reversible error, if any error, in the charge.

Respectfully submitted,

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APPENDIX

INSTRUCTIONS GIVEN AND RETURNED IN POLLARD CASE

THE COURT: I will say to you, gentlemen of the jury, in the beginning, that the first cause or count set forth in the complaint has been withdrawn from your consideration, and this case is to be determined only on the issues presented by the second cause or count set forth in the complaint, and the answer thereto and the reply.

INSTRUCTION No. 1

You are instructed that in civil cases the affirmative of the issues must be proved, and that when the evidence is contradictory the decision must be made according to the preponderance of the evidence; and that in this case it devolves upon the plaintiff to prove his claim by a preponderance of the evidence, and if you find that plaintiff has failed to prove his claim by a preponderance of the evidence, your verdict must be for the defendant.

(Given. F. L. R., Judge)

INSTRUCTION No. 2

You are instructed that the burden is on the plaintiff to prove by a preponderance of the evidence not only that the defendant was guilty of some act of negligence alleged in the second count of the complaint, but also that except for such negligence on the part of defendant the accident would not have occurred. In the absence of proof the presumption of law is that the defendant was not guilty of any negligence, and the mere fact that an accident occurred does not of itself create any presumption of any negligence on the part of the defendant.

(Given. F. L. R., Judge)

INSTRUCTION No. 3

By a preponderance of the evidence is meant the greater weight. The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into ocnsideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

(Given. F. L. R., Judge)

INSTRUCTION No. 4

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption, or other evidence satisfying your minds. You are further charged that a witness false in one part of his testimony is to be *distrusted* in others.

(Given. F. L. R., Judge)

INSTRUCTION No. 5

The jury are instructed that negligence is the failure to do what a reasonable and prudent person would ordi-

narily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done.

(Given. F.L.R., Judge)

INSTRUCTION No. 6

The Court instructs the jury, that the proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which the injury would not have occurred.

(Given. F.L.R., Judge)

INSTRUCTION No. 7

Contributory negligence, in its legal signification, is such an act or omission on the part of plaintiff amounting to a want of ordinary care as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.

(Given. F.L.R., Judge)

INSTRUCTION No. 8

You are instructed that the plaintiff in this case, on the 17th day of January, A.D. 1928, had as much right as the defendant to the use of the crossing mentioned in plaintiff's complaint. Their rights to the use of the crossing were equal, and it was the duty of both plaintiff and defendant to use said crossing for the purpose for which it was intended so as not to unduly or unreasonably interfere with the proper use thereof by the other.

(Given. F.L.R., Judge)

INSTRUCTION No. 9

You are instructed that to make the doctrine of the last clear chance applicable, three elements are indispensable, namely: (1) the exposed condition of the plaintiff, brought about by his own negligence; (2) the actual discovery by the defendant of the perilous situation of the plaintiff in time to avert the injuries complained of, if any; and (3) the failure of the defendant thereafter to use ordinary care to avert said injuries. All of these elements must concur, otherwise the doctrine has no application; and if you find from a preponderance of the evidence that any one or more of such elements is lacking, the plaintiff cannot recover under the doctrine of the last clear chance.

(Given. F.L.R., Judge)

INSTRUCTION No. 10

You are instructed that the duty imposed by the last clear chance doctrine is not to use ordinary care to discover the peril and also to avert the threatened injury, but to use ordinary care to avert the injury after the perilous situation is actually discovered; therefore, any negligence of defendant's servants in charge of said train prior to the time plaintiff was actually discovered in a position of peril has no bearing on the question of liability in this case and must not be considered by you in arriving at your verdict; and if you find from a preponderance of the evidence that, after the actual discovery of plaintiff in a position of peril, if you find he was in a position of peril, the engineer in charge of said train exercised rea-

sonable care to avert said injuries to plaintiff, your verdict must be for the defendant.

(Given. F.L.R., Judge)

INSTRUCTION No. 11

You are instructed that the only theory on which plaintiff may recover herein is that of the last clear chance doctrine, as defined and limited in these instructions; and if you find from a preponderance of the evidence that plaintiff has failed to prove all of the essential elements of that doctrine your verdict must be for the defendant. If you find from the evidence that plaintiff was guilty of negligence contemporaneous, concurrent, continuous, and contributory with that of the defendant up to and producing the injury, the doctrine of the last clear chance has no application and plaintiff cannot recover, and in that event your verdict must be for the defendant.

(Given. F.L.R., Judge)

INSTRUCTION No. 12

You are instructed that before plaintiff can recover herein it is incumbent upon him to prove by a preponderance of the evidence that the trainmen in charge of the train failed to use ordinary care to avert the injuries complained of, if any, after they actually discovered plaintiff in a position of peril and apparently unconscious of his danger or unable to extricate himself therefrom; and if you find from a preponderance of the evidence that, after the trainmen in charge of the train discovered plaintiff in a position of peril the train could not have been stopped by the exercise of ordinary care, in time to have averted

the accident, your verdict must be for the defendant.

(Given. F.L.R., Judge)

INSTRUCTION No. 13

The jury are instructed that if you find from a preponderance of the evidence in this case that the engineer in charge of defendant's train, at the time mentioned in plaintiff's second cause of action, was in a position where he could have seen plaintiff's truck stalled upon the railway crossing, if you find it was so stalled, this is a circumstance you may take into consideration in determining whether or not the servant of defendant, its engineer, saw the plaintiff in time to have averted the injuries complained of by the plaintiff. The law presumes that a person looking down the track in the position of the engineer, if you find he was looking down the track, should have seen what was in plain sight to be seen.

(Given. F.L.R., Judge)

INSTRUCTION No. 14

You are instructed that if you find from the evidence that if plaintiff, had he looked and listened, ought to have heard the warnings and signals of the train, if any were given, and that if he had exercised reasonable care he would have heard said warnings and signals, if any were given, and would have seen the locomotive and heard the noise created by the rapidly moving train, in time to avoid the accident, then and in that event your verdict should be for the defendant.

(Given. F.L.R., Judge)

INSTRUCTION No. 15

You are instructed that all persons driving motor vehicles upon the public highways of this state, outside of corporate limits of incorporated cities or towns, where the view is obscure, or when a moving train is within sight or hearing, shall bring said vehicle to a full stop not less than ten nor more than one hundred feet from where said highway intersects railroad tracks within this state before crossing the same, at all crossings where a flagman or a mechanical device is not maintained to warn the traveling public of approaching trains or cars; and if you find from a preponderance of the evidence that the crossing involved in this case is outside the corporate limits of any incorporated city or town, and you further find that no flagman or mechanical device was at the time of said collision maintained at said crossing to warn the traveling public of approaching trains or cars, and if you find that said train was moving within sight or hearing of plaintiff and you further find that plaintiff failed to bring his truck to a full stop not less than ten nor more than one hundred feet from where said highway intersects said railroad tracks, and you further find from a preponderance of the evidence that plaintiff's failure to so stop his truck was a proximate cause of the injuries, if any, sustained by him, he is guilty of contributory negligence, and cannot recover and your verdict must be for the defendant.

(Given. F.L.R., Judge)

INSTRUCTION No. 16

You are instructed that the presence of a railroad track is of itself a warning of danger; a person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train; the failure of the persons in charge of the train to keep a lookout or to give warning signals of its approach to the crossing does not relieve the traveler of the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed onto said crossing; the traveler must use ordinary care to make his looking and listening reasonably effective, and whenever there is a zone of safety within which a traveler upon a highway may, by looking and listening and stopping, if need be, to ascertain the presence of an on-coming train, it is his duty to make his observation within such zone; if he proceeds from a place of safety regardless of an approaching train of which he has knowledge, or if he leaves the place of safety without having made a vigilant use of his senses to discover a danger which is present and could have been seen from such place, then it will be held to be his negligence which is the proximate cause of the injury resulting from a collision, regardless of circumstances tending to show negligence on the part of the railroad operators. When a train is at a point which is within the traveler's vision while he is in a place of safety, he will be deemed either to have seen it and proceeded regardless of the danger, or to have failed to make a vigilant use of his senses.

Therefore, if you find from a preponderance of the evidence in this case that, when plaintiff was in a place of safety, the train was at a point on said track within plaintiff's vision and having seen the approaching train or having failed to make a vigilant use of his senses to discover the same, he entered the crossing in front of the approaching train when it was too late for the engineer in charge of said train, by the exercise of reasonable care, to avert a collision between the train and the truck which plaintiff was driving, plaintiff cannot recover and your verdict must be for the defendant.

(Given. F.L.R., Judge)

INSTRUCTION No. 17

For the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

(Given. F.L.R., Judge)

INSTRUCTION No. 18

You are instructed that if, under all of the evidence and all of the instructions of the Court, your verdict be for the plaintiff and against the defendant, then you will assess and write into that verdict the amount of the damages which plaintiff should recover. In determining this amount, you may consider the extent of his injuries, if any; the pain and suffering of plaintiff as a result of such injuries, if any, in mind and body; and in determining the amount of the damages, you may also take into consideration the reasonable cost of hospital expenses,

nurses' services, and doctor's fees, and the loss of wages, if any, suffered by the plaintiff as a result of his injuries, but in no event, however, shall your verdict be for a sum exceeding the sum of Twenty Nine Hundred ($2900.00) Dollars.

(Given. F.L.R., Judge)

(Filed: March 26, 1931.)

(Instructions Refused)

INSTRUCTION No. 19

Gentlemen: This action invokes what is commonly known as the last clear chance doctrine, and you are now being instructed as to what is necessary for the plaintiff to prove by a preponderance of all of the evidence before he can recover under the last clear chance doctrine.

In order for the plaintiff to recover under this doctrine you are instructed that you must find from the evidence:

1. That the exposed or perilous condition or situation of plaintiff's truck on the railroad crossing was brought about by his own negligence.

2. That the defendant, through its servants in control of the engine actually discovered the perilous situation of the truck upon the crossing, or in the exercise of ordinary care and diligence should have seen and discovered the perilous situation of the truck upon the said crossing in time to have stopped its engine and cars and to avoid colliding with the said truck; and,

3. That the defendant, through its said servants in control of the engine and cars after so discovering the

truck in a perilous position or situation upon the said crossing or in the exercise of ordinary care and diligence should have discovered the said truck in a perilous and dangerous position or situation upon the said crossing, and failed to use ordinary care to stop the said engine and cars in time to avoid colliding with the truck. All of these elements must concur before the last clear chance doctrine has any application.

(Refused. F.L.R., Judge)

INSTRUCTION No. 20

If by a preponderance of all of the evidence in this case you believe that the defendant, through its servants, discovered the plaintiff's position of peril on the crossing, or in the exercise of ordinary care should have discovered the plaintiff's position of peril on the crossing while the defendant, through its servants, in control of the engine, still had time to stop the engine and cars and avoid the collision with the truck and that thereafter the defendant failed to use ordinary care to bring its engine and cars to a complete stop and avoid the collision, then your verdict should be for the plaintiff and against the defendant.

(Refused. F.L.R., Judge)

INSTRUCTION No. 21

You are instructed that when a train is within a traveler's vision while he is in a place of safety, he will be deemed either to have seen it and acted regardless of the danger, or to have failed to make a vigilant use of his senses; and in this case, if you find, from a preponderance

of the evidence, that the train was within plaintiff's vision while he was in a place of safety and he proceeded onto the crossing in front of the approaching train, your verdict must be for the defendant; and you are further instructed that if you find from the evidence that the truck which plaintiff was driving stalled on the crossing in front of the approaching train, and that said train was within plaintiff's vision while it was a sufficient distance west of said crossing to permit plaintiff to have alighted from said truck and gotten to a place of safety away from the track before said train reached the crossing, your verdict must be for the defendant.

(Refused. F.L.R., Judge)

INSTRUCTION No. 22

You are instructed that the doctrine of the last clear chance has no application to a situation where by mutual carelessness an injury ensues to one of two parties. In other words, the doctrine of last clear chance excludes from the operation of its underlying principle every case wherein it may be said that the negligence of the injured party was contemporaneous, concurrent, continuing and contributory with the negligence of the party inflicting the injury; and if you find from the evidence that plaintiff, when his truck stalled on the crossing, if you find that it did so stall on said crossing, was in a position to help himself, and by a vigilant use of his eyes, ears, and physical strength, could have extricated himself and retreated to a place of safety and thereby avoided the injuries, if any, complained of, his act in remaining in said

truck on said crossing in front of the approaching train until it was too late to avert said injuries, was negligence on his part, and if you find from the evidence that such negligence of the plaintiff, if any, was contemporaneous, concurrent, continuous, and contributory with that of the defendant up to and producing the injury, the plaintiff cannot recover, and your verdict must be for the defendant.

(Refused. F.L.R., Judge)

INSTRUCTION No. 23

You are instructed that if you find from a preponderance of the evidence that the truck which plaintiff was driving stalled on said crossing and that plaintiff remained in said truck on said crossing, attempting to repair or remove said truck when the approaching train was in clear view and when the said train would and could have been seen by plaintiff in ample time for him to have alighted from said truck and retreated to a place of safety, had he been keeping a proper lookout for approaching trains, plaintiff's failure then and there to keep such a lookout for approaching trains, if you find he did so fail to keep such a lookout, is contributory negligence on his part, and if you find that such negligence of the plaintiff, if any, was contemporaneous, concurrent, continuing and contributory with that of the defendant, if any, up to and producing the injuries complained of, if any, the plaintiff cannot recover, and your verdict must be for the defendant.

(Refused. F.L.R., Judge)

INSTRUCTION No. 24

You are instructed that whenever the surrounding circumstances make the story of a witness highly improbable or incredible, or whenever the testimony is inherently impossible, and the physical conditions point so unerringly to the truth as to leave no room for a contrary conclusion, based on reason or common sense, that under such circumstances the physical facts are not affected by sworn testimony, which in mere words conflicts with them, and therefore, in this case if you find from the evidence that the physical facts are such that if the plaintiff had looked at any point when he was in a position of safety before entering said crossing he could have seen the train, and the train was on the track within plaintiff's vision, running in an easterly direction toward said crossing, and plaintiff entered said crossing in front of the approaching train too late to avoid being struck by said train, he cannot recover and your verdict must be for the defendant; and you are further instructed that if you find from the evidence that the physical facts are such that if, when the plaintiff's truck stalled on the crossing, if you find that it did so stall on the crossing, the train was on the track 600 yards or more west of the crossing running in an easterly direction toward said crossing, and could have been seen by the plaintiff had he looked, and plaintiff remained in said truck on said crossing without making any effort to discover the approaching train or to alight from said truck and get off the track to a place of safety until it was too late to avoid being struck by the

train, then and in that event plaintiff cannot recover and your verdict must be for the defendant.

(Refused. F.L.R., Judge)

(Filed: March 26, 1931.)